

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

Cal. No. 1031

v.

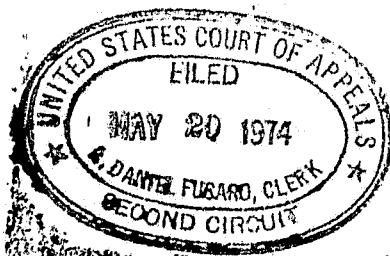
No. 74-1005

CZAS PUBLISHING COMPANY, INC.,

Respondent.

BRIEF FOR
CZAS PUBLISHING COMPANY, INC.

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STATEMENT OF ISSUES PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's findings that the Company violated Section 8(a)(1) of the Act.
2. Whether substantial evidence on the record as a whole supports the Board's findings that the Company violated Section 8(a)(3) and (1) of the Act.
3. Whether substantial evidence on the record as a whole supports the Board's findings that the Company violated Section 8(a)(5) and (1) of the Act.

STATEMENT OF THE CASE

This case is before the Court on the application of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.) for enforcement of its order against the Czes Publishing Company, Inc. (hereafter, the Company) issued on August 23, 1973. The Board's decision and order (A. 2-63)^{1/} are reported at 205 NLRB No. 158. This Court has jurisdiction of the proceedings, the unfair labor practices having occurred in Brooklyn, New York.

STATEMENT OF FACTS

Respondent is a small printing operation which employs seven workers. Its sole stockholder is the Polish National Alliance (herein called "PNA"), a Polish fraternal insurance group of which all of Respondent's employees are members. The main interest of the PNA is in fostering a consciousness of Polish nationality and ethnicity through various activities which it supports, one of these being Respondent. Respondent has had the distinction of publishing the only Polish language newspaper on the East Coast of the United States and has done some printing work for other Polish groups, thus representing the ideals of the Polish community which the PNA has always attempted to encourage and

^{1/} A. references are to the pages of the printed Appendix.

foster. For this reason, its Board of Directors has seen fit to deal exclusively with Respondent over the years, as Respondent's primary customer.

Unfortunately, the intrinsic value of such a publication has not kept it from losing money consistently, and Respondent has operated "in the red" for nine out of the past ten Years. Despite this, the PNA, as the principal stockholder, has allowed the operation to stay in existence because of its function in the Polish community. An additional consideration can also be found in the fact that the employees of Respondent, all of whom are members of the PNA, would find it difficult to find work elsewhere in the printing field, largely due to the problems of language and limited skills. Because of the common membership in the PNA and the ethnic background involved, the Respondent's operation has been run on a family basis, with close day-to-day contact between its employees and managers.

In late May, 1972, Local 51, N. Y. Printing Pressmen and Assistants Union of North America and Local 6, International Typographical Union, AFL-CIO, began an organizational campaign among the employees of the Respondent. The management of Respondent made no secret of the fact that they would prefer their employees, who were non-union, to reject union membership, but this feeling did not stem from any intrinsic malice toward labor organizations, but rather from the fact that any union contract would inevitably involve an increase in operating expenses to a company which had consistently operated at a loss. Management, which had close ties with the PNA, considered it very likely that the PNA would not be willing to absorb such a heavy additional expense and that Respondent would, therefore, be forced to discontinue its operations. Statements made to the employees concerning unionization were thus reflective of a sound and pragmatic approach to the foreseeable economic consequences for the Respondent and its workers, and not of any union animus. In fact, all dealings with the union by Respondent, were amicable and when management was informed that PNA had voted against continuing to operate Respondent, should the operating losses increase, as they would in the case of

unionization, this information was promptly relayed to the union representatives.

When the employees voted to unionize, the management of Respondent anticipated that it would have to discontinue business for economic reasons, and its actions were governed accordingly. Respondent subsequently refused to take on large printing jobs under the assumption that it would not be able to meet its commitments. As a result of the anticipated closing, there arose a limitation of the needs of Respondent, which resulted in the firing of Stefan Jachemczyk and reduction of overtime and layoffs for several employees, including Mieczyslaw Pajak.

Stefan Jachemczyk was first employed by Respondent some 18 years ago, his most recent duties being that of a general handyman, working in the shop, making outside deliveries and generally being called upon to perform the less skilled duties required in the operation of Respondent's business.

Said employee was discharged by Respondent on August 29, 1972 and subsequently filed a complaint against Respondent, charging said discharge was brought about as a result of his union activities, and his refusal to accede to Respondent's demands and pressure that he join Respondent in their efforts to prevent the approval of the union by Respondent's employees.

Said employee categorically testified that he had a spotless employment record during his entire tenure of employment, was never late, and in all respects, performed according to the highest standards of behavior during his employment. The employee testified as to various incidents and meetings with management, where efforts were made to dissuade him from supporting the pro-union employees. The employee admitted receiving a nominal raise from management after the pro-union activities were initiated (A. 144) and in respect to his employment record, testified that he was never late, that fellow employees were never sent to his home requesting he appear at work and that his conduct and behavior with fellow employees was exemplary and without friction or difficulty.

Respondent's position was that said employee, Stefan Jachemczyk, was fired for cause, his work record being unsatisfactory, and his failure to report to work on August 29, 1972 was the culmination of a long record of unsatisfactory employment behavior, bringing about the formal discharging of this employee.

Respondent's manager, K. Zajac, testified that the official employment record of Respondent (Rap. Ex. 1) showed entries listing the employee as being late for work due to the effects of alcohol on approximately thirteen occasions (A. 185-187). He also testified that other employees were sent to this employee's home, which testimony by Respondent's witness was substantiated by General Counsel's witness and which was further substantiated by Respondent's shop foreman, Peter Kubicki, whose testimony also controverted the employee's claim of non-pugnacious behavior, testifying to a specific incident where he was knocked down by this employee during a fight (A. 206).

Employee, Mieczyslaw Pajak, who has been employed by Respondent for approximately the past six years as a linotypist (A. 103), being the junior man in his job classification, filed his complaint against Respondent on January 18, 1973, alleging unfair labor practices with respect to layoffs from employment in August and September, 1972, failure to receive Christmas bonus and discrimination in allotment of holiday overtime work.

During the course of various meetings with Respondent, it was stated that Respondent could not afford a union shop (A.216) and although this employee attempted to by-pass the union before the election, where the employees voted four to three for the union, by attempting to negotiate an increase, Respondent was unable to negotiate with him and accordingly, advised him nothing being accomplished because of Respondent's unwillingness to by-pass the union, and that the decision had to be reached by the Board of Directors of Respondent.

Employee, Mieczyslaw Pajak, admitted that the men who received bulk of overtime work had greater experience and seniority than he did and also that none of the employees received a Christmas bonus and it was demonstrated that

the overtime work for all employees was considerably less than in past years (Resp. Exs. 2, 3 and 4). It was also noted that although September and August were usually slow months (A. 192), business was never so slow as in 1972 (A. 192).

Respondent's officers have consistently advised its employees that they could not meet union demands not because they were against unions, but simply because they couldn't afford the expense and this was formally decided by the Board of Directors who immediately notified the union representatives.

ARGUMENT

POINT I

THE N.L.R.B. ERRED IN REGARD TO CONCLUSIONS AS TO FINANCIAL STATUS OF RESPONDENT AND ITS RE- LATION TO THE ACTIONS WHICH IT HAS TAKEN

The record of this case is full of uncontradicted statements that Czas Publishing Co., Inc. was going out of business for economic reasons, yet none of this has been given any credence. From the time of its answer to the complaint, Respondent has stressed the fact that it had continually operated in the red, and that it had lost money for nine of the last ten years. This fact was noted by Counsel for the Respondent in his opening statement (A. 87-88), and Julius Seide, witness for the General Counsel, admitted that he had been so informed. Czas was able to remain in business largely because of the fact that its principal customer was Polish National Alliance, a fraternal organization which deals primarily in the field of insurance, but as such, PNA's expenditures in the form of such purchase of newspapers are subject to review, and in fact, in 1966, the N. Y. State Insurance Department forced PNA to reduce a loan in the form of a mortgage to Czas by \$30,000.00. For this reason, it would seem that the Administrative Law Judge not only over emphasized the relation between Czas and PNA, which are entirely separate and distinct, but also completely overrated the ability of PNA to assist Czas, notwithstanding the fact that it fixed the price per issue of the paper. As an

insurance company, PMA could simply not be allowed to over-extend itself in what could obviously be termed a "bad risk", at least economically speaking.

While it is true that PMA had been able to assist Cmas in the past, there is ample, uncontradicted evidence in the record to show that under any union contract, the increase in labor costs would become prohibitive. A consideration of the present and proposed salaries for the workers is indicative of this. Stefan Jachemczyk, who was among the lesser-paid workers, admitted to receiving a weekly salary of \$129.59 per week, while Mieczyslaw Pajak who was one of the higher-salaried employees, stated that he received \$173.25 weekly. Once unionized, however, salaries were subject to a large increase. Mr. Seide, the union representative, stated that it was his objective to eventually bring salaries up to \$261.00 per week (A. 91) and to reduce the working hours to 34½. In addition, the union required the following contributions:

- (1) welfare fund (4%)
- (2) pension fund (5%)
- (3) labor security fund,
E & RSUB fund (2%)

in addition to the salary increase (A. 95).

Assuming that the average salary of Cmas employees is somewhere between \$129 and \$179, the average salary increase for a worker at Cmas would be somewhere around 70%. Even considering the possibility that such increases could be spread out over two or three years, as suggested, the increased labor cost to Cmas of a union shop would have to be quite substantial. It seems obvious that a company which has operated at a loss for so long should not be able to afford such an increase, and one does not have to be an accountant to recognize that such a state of affairs can only lead to the conclusion that an operation like this should be discontinued. Accordingly, on November 27, 1972, it was voted that Cmas should close up its operations after finishing work on its remaining contracts. Mr. Seide was informed of this situation the very next day and on March 3, 1973, he received a written notice of the fact that the company was "phasing out" its business (A. 98).

It would be foolish to believe that the officers of Cmas did not appreciate the effect of the certification of the unions and the increased

labor costs which this was bound to entail, yet all manner of statements by persons in any way connected with Czas have been interpreted as attempts to coerce employees in violation of the National Labor Relations Act. Under these circumstances, any laymen should be able to appreciate the economic effect of unionization even before formal proposals were received or unions certified simply by looking at rates in union ships, but Joseph Glowacki, who is accused of "coercion", undoubtedly not only recognized this, but due to his separate positions with Czas and the FWA, was fully able to appreciate that the position of the company even prior to the election, was far from stable or prosperous. In short, the company was operating at a small labor cost and still losing money - unionization would have to jeopardize its very existence. All of the statements made by this man and others about closing the company were reflective of this state of mind, and were expressions of the only logical and practical conclusion to be arrived at after any evaluation of the company's financial situation.

Accordingly, once the results of the election made it apparent that Czas would have to pay its employees at a much higher rate than could be afforded, it became clear to the management of the company that it would have to shut down, and there began a "phasing out" operation. Because of certain contractual obligations, it was impossible to close down the operation within a short time, but there was a cutback in several phases of the business: new orders were not accepted, and there was a cutback in the work force, which resulted in the firing of Stefan Jachemczyk and the subsequent layoff of other workers. Thus, Mr. Glowacki's statement that the union vote "had destroyed the last Polish newspaper" (D., P. 10, L. 2), although made in a mood of bitterness and resentment, was not a threat, in fact, it now seems to have been a pretty accurate evaluation of the effect of unionization on the company.

Similarly, the layoffs and discharges were motivated by economic reasons. Stefan Jachemczyk had a long history of lateness, poor performance of work, etc., which has been amply demonstrated by the record in this case, and

Respondent had in past years, admittedly tolerated his behavior without firing him. It must be noted that there were considerations for this: the fact that he belonged to the parent organization, PMA, could not easily find work elsewhere because of language and training deficiencies, and the fact that he had to support a family, his wife having visited Mr. Glowacki in the past, persuading him not to fire her husband. However, once the shop became unionized, Jachemczyk's job was no longer needed, since it was anticipated that Czas would close, this fact being stated by Mr. Glowacki on numerous occasions, both before and immediately after the election. The position he held has remained vacant to this day, and the phasing out has seen a reduction of the work force from seven to four men.

Pajak, Palka and Mamelko were laid off because of a work reduction due to the expected closing, and were returned to their jobs when work was available. The record also demonstrates that there was a marked decrease in overtime in the pre-Christmas period (Resp. Ex. 2, 3, 4, 5). Methods used for determining allotment of overtime - seniority, work available and ability to do the job - did not involve union considerations. It was noted in the opinion that in past years, Pajak and Mamelko had received a somewhat higher percentage of the available overtime, but it must be noted that since closing was anticipated in the future, Respondent felt obliged from a sense of fairness and loyalty to let the men who had been there longest get the extra work whenever it was available. The methods used, although more rigidly adhered to than in past years, were warranted by the circumstances involving the closing of Respondent's operation.

In conclusion, there is abundant and uncontroverted evidence that, based on their knowledge of the company's financial problems and the expected costs of a union shop, the management of Czas fully expected to close once the workers chose to be represented by a union and the fact that the company announced its phasing out serves to confirm these beliefs. Although Respondent had lost money in the past and continued operations, the two situations are in no way comparable, for by August of 1972, closing was seen as an unavoidable

necessity. Work assignments were made on the expectation that the Respondent would eventually cease operations, new orders were turned away and Jachemczyk, whose poor attendance and work records only constituted an additional burden on a company which was shutting down, was let go by Czaa.

POINT II

THE N.L.R.B. ERRED IN CONCLUDING
THAT FOREMAN, PETER KUBICKI, WAS
AN AGENT OF MANAGEMENT AND ATTRI-
BUTING PURELY PERSONAL ACTS ON
HIS PART TO RESPONDENT

As the Administrative Law Judge noted in his opinion, Peter Kubicki signed the answer to the complaint but this fact does not indicate an intention to represent himself as an 'agent' of Respondent. It must be pointed out that his signature appeared on the answer for the sole purpose of denying those allegations of the original complaint which were directed at and affecting him. His status as a "working foreman" was not disputed by the General Counsel or any witnesses, and the fact that he was allowed to vote in the union election, which was ordered and supervised by the NLRB, is still further evidence that he cannot be considered an agent of management. In W. T. GRANT CO., 185 NLRB 14 (1970), a section head in charge of all departments in a particular area was found not to be a supervisor, it being noted in that case, as here, that the activities of the person directing the work were routine, and that there were no unambiguous indicia of supervisory authority, such as the power to hire and fire workers under him.

At any rate, the conclusion that everything which this man said and did concerning jobs and the unions to his fellow employees, were acts of the Respondent in furtherance of a coordinated plan to discourage union membership - all of this in the absence of any strong proof of such a link - is one which defies credibility. In the course of his job, Kubicki had occasion to converse with the workers on one hand and supervisory personnel like Zajac and Glowacki on the other, and he was obviously well aware of feelings on both sides. From the conversations with management, he knew that Czaa would close

because it could not afford a union wage scale. Here was the senior man in the company with a position as foreman of the shop, faced with the loss of the job which he had held for so many years - is it so incredible that a person in such circumstances might become worried about the future and convey these worries to his fellow workers? Kubicki, as a foreman, had no connection with the management of Respondent and all of his discussions were on a personal level with his fellow workers. He was concerned about his own job. Likewise, buying a drink for a fellow worker at a bar while discussing job problems, which in this case would naturally include such things as the status of the Respondent, unionization, etc., cannot be viewed as an unfair labor practice without disregarding the need for proof of such a violation.

Moreover, Kubicki, along with the others who approached Glowacki, about a non-union settlement, signed the offer by the employees for a wage increase, an act hardly appropriate for an agent of management. In short, his actions were not attributable to the Respondent, but were simply those of an older worker who was faced with the loss of his job.

POINT III

THE N.L.R.B. ERRED AS TO CREDIBILITY OF
GENERAL COUNSEL'S WITNESSES, MOST PARTI-
CULARLY, STEFAN JACHEMCZYK and IN REFUS-
ING TO ADMIT TESTIMONY OF TWO OF
RESPONDENT'S WITNESSES AS TO STEFAN
JACHEMCZYK'S REPUTATION FOR DRUNKENNESS
AND BELLIGERENCE

The testimony of Stefan Jachemczyk relating to the material issues in this case is full of inconsistencies and contradictions, yet he has been credited by the Administrative Law Judge in nearly all cases. In NLRB vs. SMOKY MOUNTAIN STAGES, INC., 447 F.2d 925 (1972), denying enforcement to 169 NLRB 777, it was noted that in view of the employee's persistent lies and misrepresentations during his testimony, most of which was contradicted, it was arbitrary and capricious for the Board to credit his testimony where it was contradicted.

His testimony as to his attendance record was totally contradicted by the testimony of Mr. Zajac and by the attendance records of the plant. Like-

wise, he denied fighting on the job, this testimony also being refuted by Mr. Kubicki, his foreman; plant manager, Zajac, who kept attendance records, also made notations in the attendance book which indicate that on numerous occasions, Mr. Jachemczyk appeared at work in a disheveled condition and with alcohol on his breath. Obviously, this affected his performance of work on the days when he showed up in such a condition.

Admittedly, Mr. Jachemczyk was far from being a model employee, and in fact his firing was contemplated on several occasions, but a sense of compassion coupled with pleas on the part of his wife prevented such an action at those times. Moreover, it was common knowledge in the neighborhood that Mr. Jachemczyk was an alcoholic who had a reputation for belligerence, but the witnesses of Respondent who were prepared to give testimony to this effect, were not allowed to testify by the Administrative Law Judge. Yet their testimony would have established Mr. Jachemczyk's reputation, of which the workers at Czas and the supervisors involved were well aware and which obviously figured in the action which was taken on August 29, 1972, when he refused to appear for work.

The circumstances surrounding his non-appearance at work - without any phone call to Czas, to explain his alleged sickness on the day in question and after the foreman, Mr. Kubicki, had been sent over to his home to fetch him - a practice used on occasion in the past on days when he was needed at work - coupled with his reputation and past work history, were sufficient to convince the management of Czas that there was no reason to continue to tolerate the situation. It must again be noted that he offered no immediate explanation for his absence, but rather came to Mr. Glowacki's office after the decision to fire him had already been made. The note which he produced (G. C. Ex. 3; A.82), allegedly from his doctor, was originally ruled inadmissible as hearsay evidence and later admitted, over the objection of Respondent's Counsel, on other grounds.

Finally, these factors must also be viewed in the light of the economic picture. The union had been favored in the elections, leading the

management of Crag to immediately conclude that the shop would close and considering Mr. Jachnaczyk's past work history, along with this change in the situation, there was simply no reason to continue to employ a man who had been something of a liability to Respondent in the past. The situation was quite simple: the Respondent was going to close anyway, so it felt no obligation to continue the employment of a man whose years with the company had always been marked by lateness, intoxication on the job, belligerence and poor work performance. The fact that the job has been abolished during the phasing out operation gives indication of another factor, namely that his position was no longer of any value to the company at the time.

POINT IV

THE N.L.R.B. ERRED IN REFUSING TO FIND THAT RESPONDENT BARGAINED IN GOOD FAITH WITH UNIONS

The finding that Respondent failed to bargain in good faith with the unions appears to be contrary to the weight of evidence. From the time of the election, it was made clear that it was felt that the company could not afford a union contract, and there was never any change from this position. Thus, from the very first negotiating session, all of the cards were laid on the table. In spite of this situation, however, Respondent did not arbitrarily refuse to hear the union demands, but rather listened to proposals as they were offered. "Bargaining" does not require that one of the parties enter into a contract on the other's terms, and in this case, it was obvious that negotiations would necessarily be without a significant area of agreement, for the lowest possible union demand was far above what Respondent could afford to pay without destroying it financially.

In NLRB v. New England Web, Inc., 309 F.2d 696 (1962), setting aside 135 NLRB 102, the court refused to find a violation in the shutting down of a plant after a pro-union vote in an election. The situation was identical to the one which faced the Respondent, involving a company whose economic position had been deteriorating in past years, and whose directors fully expected a union contract to still further worsen its financial status.

Moreover, it must be noted that the management of Czas was consistently willing to entertain proposals from the union representatives as to how the volume of business might be increased to the point where the company would be financially able to meet union demands. General Counsel's witness, Mr. Seide, admitted taking part in such discussions, one of which involved the possibility of hiring sales people in order to solicit new business. The possibility of the employees of Czas getting together to buy or lease the business was also brought up, but the workers were not able to get together and the matter was eventually dropped.

All of the dealings of Respondent with the unions have been marked by openness, friendliness and punctuality, even though no agreement was reached and although it was decided to close Czas. Mr. Seide was immediately notified of the decision, as well as of the firing of Stefan Jachemczyk and, in fact, Mr. Glowacki actually sent a copy of the wage proposals which the workers had approached him with (A. 84) to the union representative. Thus, far from trying to bargain secretly behind the union's back, as has been suggested, the action of Respondent in communicating these proposals to Mr. Seide is still further evidence of its good faith in dealing with the union.

CONCLUSION

For the reasons stated above, it is respectfully submitted that a judgment should issue refusing enforcement to the Board's order.

Respectfully submitted,

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